

12-1-2002

Unconscionable Lawyers

Paul D. Carrington

Follow this and additional works at: <https://readingroom.law.gsu.edu/gsulr>

 Part of the [Law Commons](#)

Recommended Citation

Paul D. Carrington, *Unconscionable Lawyers*, 19 GA. ST. U. L. REV. (2002).
Available at: <https://readingroom.law.gsu.edu/gsulr/vol19/iss2/3>

This Article is brought to you for free and open access by the Publications at Reading Room. It has been accepted for inclusion in Georgia State University Law Review by an authorized editor of Reading Room. For more information, please contact mbutler@gsu.edu.

GEORGIA STATE UNIVERSITY LAW REVIEW

VOLUME 19

NUMBER 2

2002

UNCONSCIONABLE LAWYERS

Paul D. Carrington*

INTRODUCTION

Lawyers writing standard form contracts for clients to use in recording transactions with parties not represented by counsel have a professional duty to restrain their zeal. It is my impression that many lawyers are unaware of such a duty. As a consequence, many cause injustice and expose themselves and their firms not only to such appropriate moral sanctions as the contempt of fellow citizens and other lawyers, but also to some risks of tort liability and professional discipline.

Some contract provisions now in fashion disgrace our profession. They are designed to strip inadvertent, improvident, and impotent citizens of procedural rights they need to enforce the substantive

* Professor of Law, Duke University. Don Clifford, Roger Cramton, Paul Haskell, and Susan Koniak made helpful comments on an early draft. Christian Jinkerson, Matt Greenley, and Paul Castle helped with the references. The paper was presented at Georgia State University College of Law on February 14, 2002. The paper was also presented to the American Bar Association Section on Business Law in April 2002. I received helpful comments from both audiences. It was written with the memory of Alvin Rubin much in mind.

rights that may become important to them. Such provisions divest not only those rights set forth in the standard form contract, of which the dispute resolution clause is a part, but also substantive rights created by state and federal laws enacted to protect consumers, employees, investors, and small business from diverse predatory business practices—laws that commission individual citizens as private attorneys general to discourage as well as compensate for such predation. Many of our state and federal laws regulating business practices are enacted to be enforced by private citizens who serve others by pursuing their own claims. What some lawyers seek to do for their clients is to secure the private repeal of those laws or, failing that, to cause individuals to believe that they have been repealed.

Among the procedural rights that some lawyers seek to deny to parties with whom their business clients deal are the rights to (1) a convenient forum, (2) trial by jury, (3) a public hearing, (4) an impartial judge, (5) one who is accountable to a higher court for his or her adherence to the governing law, (6) exemplary or treble damages if provided by controlling law, (7) provisional remedies such as preliminary injunctions or attachments, (8) the traditional American rule with respect to the taxation of attorneys' fees, (9) the right to conduct a private investigation of possible wrongdoing and gain access to the information of an adversary through the use of modern discovery rules, and (10) the right to participate in a class action. It is of course in the interest of any litigant to control the resolution of all these features of conventional American civil procedure. It may be especially advantageous to gain such control if the client hiring the lawyer to write the contract is engaged in sharp business practices and thus expects to be an "habitual defendant" in civil actions.

To be sure, all the procedural rights enumerated may be waived by parties engaged in the resolution of an existing dispute. But it does not follow that they may be waived by parties before they are engaged in a dispute when they cannot reasonably be expected to contemplate future disagreement, when they are not advised by

counsel, or when they have little or no bargaining power with the firm that is imposing its business form on them as a record of an unnegotiated transaction. Under traditional common-law principles, predispute waivers are revocable.¹

There is, however, at present a raging epidemic of provisions in standard form contracts purporting to strip the party on whom they are imposed of needed procedural rights. Some of these provisions have the apparent effect of making the purported contract illusory to a consumer or worker contemplating their application to a present controversy with the party providing the printed form. Many also have the apparent effect of making it difficult or impossible for the individual on whom the form is imposed to enforce non-waivable substantive rights or to perform the public role of private attorney general. Every reader of this article has recently been given a standard form to record a business transaction where that form contains provisions imposing disadvantages on him or her that would be significant only if he or she should later fall into a dispute with the firm for whom the form was written.

It seems unlikely that business clients, on their own and out of the blue, generate the idea of imposing such terms on the inadvertent, improvident, or impotent persons with whom they deal. Imposing such terms must often be suggested by counsel who draft the standard form contracts. They know that some persons with whom their clients will consummate the contracts will find that the procedural rights purportedly abrogated by the form are needed to

1. Paul D. Carrington & Paul Y. Castle, *Contract Provisions Controlling Resolution of Future Disputes*, __ LAW AND CONTEMP. PROBS. __ (Forthcoming 2003). As one court put it: "[b]y first making the contract, and then declaring who should construe it, the strong could oppress the weak, and in effect so nullify the law as to secure the enforcement of contracts usurious, illegal, immoral, or contrary to public policy." *Parsons v. Ambos*, 48 S.E. 696, 697 (Ga. 1904); cf. *Cocalis v. Nazlides*, 139 N.E. 95 (Ill. 1923); *W. H. Blodgett Co. v. Bebe Co.*, 214 P. 38 (Cal. 1923). See also NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 60-73 (1924). As late as 1924, both the National Conference of Commissioners on Uniform State Laws and the American Bar Association took positions firmly in opposition to what was perceived by some to be an idiosyncrasy of New York law, i.e., the enforcement of arbitration clauses contained in printed contracts. IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 49-51 (1992). The Uniform Arbitration Act of 1924 denied enforcement to predispute agreements. See *id.* at 49-54.

pursue claims against the business that imposed an unjust provision on them.

Part I of this article introduces the form contract and contracts of adhesion. Part II examines the ethical problems associated with these types of contracts. I describe a personal experience to illustrate the common pitfalls when attorneys draft such contracts. Part III examines the unconscionability of arbitration clauses using specific examples of recent court decisions. Part IV reviews the possibility of professional disciplinary action against lawyers who draft unconscionable contracts. Part V explores possible malpractice liability when attorneys draft deceptive or illusory contracts. Part VI illustrates the difference between a lawyer's simply giving advice and consummating the deception by actually drafting the contract.

I. THE LAW OF ADHESION CONTRACTS

Printed form contracts were not in general use until the latter half of the Nineteenth Century. They are, of course, necessary in the modern world to structure and record a vast array of commercial relationships.² Businessmen making deals are rightly accountable for the terms in forms they sign, whether they read them or not. But even businessmen may not be held to terms that conflict with the printed forms they offer to those with whom they make contracts.³ Consumers, employees, and franchisees do not generally provide forms to record their transactions with the businesses with which they deal. Perhaps they should consider doing so,⁴ for if they did, and there were thus "battles of forms," many of the dispute resolution clauses contained in many forms would be set aside on account of the obvious lack of mutual assent.

Whatever may be the case for businessmen engaged in important exchanges, the reality is that most of the "contracts" that most of us

2. See Arthur Allen Leff, *Contract as Thing*, 19 AM. U.L. REV. 131, 143-44 (1970).

3. Such battles of forms are resolved in accordance with Uniform Commercial Code § 2-207 (2002).

4. For a suggestion as to such a form, see the Appendix, *infra*.

make as consumers are never read for the good reason that they are not really contracts in the moral and classical legal sense of that term.⁵ Frequently, as is often the case with insurance policies, the purchaser may not even have an opportunity to read or sign the written instrument because it is delivered after the transaction has been performed.⁶ Even if such documents are “in hand” earlier, life is much too short for consumers of goods and services to read with care printed passenger tickets, bills of lading, warehouse receipts, insurance policies, hospital admission forms, apartment leases, warranties on consumer goods, package inserts, service contracts, terms flashed on a computer screen as part of an order form,⁷ envelope inserts that come from banks or credit card companies, or brokerage agreements. Such instruments are virtually unreadable by most persons to whom they are presented, even those who are well-educated and wearing their prescription glasses. Never mind those millions who are illiterate, uneducated, disabled, or to whom English is a foreign language, none of whom can possibly be said to have assented to any terms disadvantageous to themselves.

Moreover, insofar as such forms deal with future disputes, a customer often perceives the matters they address to be so remote and unlikely that their terms are of no immediate interest to a reasonable consumer. As Melvin Eisenberg put it, given the risk preferences of all but the most suspicious persons, it is not worthwhile to investigate the possibility of an adverse dispute resolution clause in a printed form contract.⁸ No “single shot

5. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1981) (“A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms.”). See Lewis A. Kornhauser, *Unconscionability in Standard Forms*, 64 CAL. L. REV. 1151 (1976).

6. W. David Slawson, *Mass Contracts: Lawful Fraud in California*, 48 S. CAL. L. REV. 1, 12 (1974). See also Friedrich Kessler, *Contracts of Adhesion -- Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943).

7. On approaches to the problem of click-wrap contracts, see Elizabeth Thornburgh, *Going Private: Technology, Due Process and Internet Dispute Resolution*, 34 U.C. DAVIS L. REV. 150 (2000).

8. Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211 (1995); see also Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996).

player,” not even a Samuel Williston fascinated with contract terms,⁹ can be reasonably expected to take the time to pursue the meaning and significance of the terms of such form contracts because he, unlike the party imposing its terms on him, would not enter the transaction at all if his mind were on the calamities that are the subject of the unread terms. In contrast, it pays the “repeat player” to be attentive and hire a draftsman of forms to assure himself of every available advantage when the inevitable disputes arise. Lawyers who write standard form contracts know these things full well.

These are the reasons that consumers of goods and services have no practical choice but to rely on the integrity of the businesses that print the forms to record their transactions and on the professional responsibility of the lawyers who write them to assure that the terms set forth in the forms do not impair their substantive rights. This reliance would exist even if the onerous provisions were written in large type and came with a full explanation including a glossary of terms.¹⁰ Thus, the Uniform Commercial Code invalidates unconscionable terms no matter how large the print in which such terms are written.¹¹ Similarly, insurance contracts are closely regulated in every state.

The problem of standard form contracts is somewhat different for the job applicant or the person seeking a franchise for his or her local neighborhood business. With regard to such parties to contracts, the issue is simply one of bargaining power. As the Supreme Court of California has recently emphasized,¹² Williston himself, if he wanted routine employment, would not feel free to try to negotiate with a prospective employer over a dispute resolution clause. Even if it was in the back of his mind, he could not say to a prospective employer,

9. The author of the definitive treatise, see SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS, (4th ed. 1990).

10. It seems likely that the repeat player could overcome this problem by offering the single shot player a reasonable choice of prices for the goods or services that are the subject of the contract. That would, however, create the additional problem that the consumer would then be induced to reflect on the prospects of a dispute and would be likely to choose the lower price only if it were significantly lower.

11. U.C.C. § 2-302 (2002).

12. *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000).

“Now let’s talk about my right to sue you if I am mistreated or fired.” Unless he was an extraordinary talent in great demand in the employment market, a person expressing such a concern at such a time would not expect to get the job. The matter might be otherwise if the prospective employee is an executive officer, a star athlete, or an entertainer rather than a routine applicant. Because most employees lack bargaining power with their employers, the federal and state governments find it necessary to regulate employment relationships. If such persons had the economic power to gain a fair bargain, the labor market would not be regulated, as it is in every civilized nation. Likewise, if small franchisees had the power to secure fair terms, there would be no need for legislation to protect them, as most American states do.

For all these reasons, courts have long exercised caution in enforcing provisions in form contracts that are unduly favorable to the party who printed the form and presented it as the predestined assent of the consumer, employee, small business or other person expected and indeed, as a practical matter, required to submit to their terms. Thus, in 1889, even in the age of rampant Social Darwinism, the Supreme Court of the United States held that a disclaimer of liability for negligence in a bill of lading is invalid.¹³ In 1909, Roscoe Pound explained that a contract is often a means by which persons with economic power exploit the weakness or inadvertence of those with less power whose wealth is thereby transferred from the poor to the rich.¹⁴ In 1919, Edwin Patterson, commenting on then recent developments in state courts, introduced into our vocabulary the term “contract of adhesion.”¹⁵ The term applies to agreements that are not the result of bargaining and are recorded on printed instruments. Patterson noted that in such transactions, “‘freedom of contract’ rarely exists” on both sides.¹⁶ Courts therefore seek to

13. *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 441 (1889).

14. Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

15. Edwin Patterson, *The Delivery of A Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919).

16. *Id.*

protect the party who casually or inadvertently assents to a very improvident term.

The 1889 Supreme Court decision foretold provisions in both the Restatement of Contracts¹⁷ and the Uniform Commercial Code¹⁸ that counsel general restraint in the enforcement of provisions in adhesion contracts that may be overbearing. A lucid explanation of that view was provided by Karl Llewellyn, the draftsman of the Code:

Instead of thinking about 'assent' to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the more broad type of the transaction, but one thing more. The one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent term the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print that has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in.¹⁹

It bears emphasis that form contracts containing dispute resolution clauses often bear on the enforcement of statutory rights conferred on parties lacking economic power, to protect them from predatory practices of a stronger party. Our economy is replete with such regulation of contracts. Thus, Congress has long regulated the freedom of carriers to write clauses into passenger tickets or bills of lading that are disadvantageous to passengers or shippers. Every state provides elaborate regulation of the language of insurance policies. In the Nineteenth Century, Congress enacted the first

17. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 205, 211 (1981).

18. See, e.g., U.C.C. § 2-302 (2002).

19. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1960). On the relation between this idea and the Code, see Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975).

antitrust law;²⁰ it was amplified in 1914.²¹ Many other federal laws have since been enacted to give more specific protection to small businesses that were inviting targets for predation by larger businesses. These laws include, for example, special federal legislation to protect automobile dealers²² and petroleum product dealers.²³ Every state legislature has enacted some similar laws, such as franchise investment laws to prevent all sorts of franchisors from overbearing their economic power over franchisees. Congress has also long regulated the freedom of contract of employers to prevent the exploitation of people who need work;²⁴ and, again, so has every state. No law enacted to limit freedom of contract for the protection of the weaker parties can rightly be treated as subject to virtual repeal by the inclusion in adhesion contracts of provisions disabling those protected by such laws from enforcing their rights.

There is a public interest in the enforcement of all these laws enacted to restrict freedom of contract. The small business that defends its rights against an overreaching big business protects not only itself, but the public interest. So does the worker who enforces her statutory rights. The laws enumerated recognize that economic power is as subject to abuse as political power. In other economically developed countries, primary reliance for the regulation of private economic power is confided in a bureaucracy.²⁵ In America, distrustful as we are of government, we have confided in individual litigants and their lawyers the responsibility of serving as private attorneys general. This is why our laws confer bounties on lawyers and their plaintiff-clients in the form of treble or exemplary damages, or one-way fee-shifting. If a predatory business can

20. Sherman Anti-Trust Act of 1890, 15 U.S.C. §§ 1-7 (2002).

21. Clayton Act of 1914, 15 U.S.C. §§ 12-27 (2002).

22. Automobile Dealers Day in Court Act, 15 U.S.C. §§ 1221-25 (2000).

23. Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-06 (2000).

24. See, e.g., California Fair Employment and Housing Act, CAL. GOV'T CODE § 12900 (West 1992); The Occupational Safety and Health Act, 29 U.S.C. §§ 651-78 (2000).

25. See Christopher Hodges, *Multi-Party Actions: A European Approach*, 11 DUKE J. COMP. & INT'L L. 321, 342 (2001); see also PRODUCT LIABILITY LAW AND PRACTICE (1993); EUROPEAN COMMISSION REPORT ON THE APPLICATION OF DIRECTIVE 85/374 ON LIABILITY FOR DEFECTIVE PRODUCTS 27 (Jan. 31, 2001).

exempt itself from the enforcement of these laws by imposing disabling contract provisions on all the private attorneys general on whom we rely, our substantive regulatory laws will have been *pro tanto* repealed. Such a business would have achieved self-deregulation.²⁶ Surely those who favor sweeping deregulation would favor that result. However, the “national policy” favoring arbitration expresses no such purpose,²⁷ and no political institution accountable to an electorate would contemplate such a policy.

II. THE ETHICS OF COUNSELING SELF-DEREGULATION

It is of course only natural that parties with greater economic power would (if permitted) seek by adhesion contracts to self-deregulate by gaining control of dispute resolution procedures through the terms of standard form contracts. The question I here wish to address is the professional responsibility of lawyers serving clients having the economic power to attempt that feat.

The ethical problem begins with the impulse of lawyers to think of the drafting of form contracts as an adversarial activity in disregard of any consideration of the rights of the other parties to the contracts who may be illiterate, ignorant, disabled, inattentive, improvident, or just too weak to protect their interests, and almost certainly will not be advised by counsel at the moment when they receive the form. There being no real adversary, the conditions justifying the adversarial tradition are absent. This observation is implicit in the preamble to the Model Rules of Professional Conduct explaining the need for zeal in the performance of the lawyer's role as advocate.

26. On the questionable effectiveness of simple arbitration clauses to achieve self-deregulation, see Paul D. Carrington, *Self-Deregulation: A National Policy of the Supreme Court*, 2 NEV. L. REV. ____ (Forthcoming 2002). An exception may be noted for the enforcement of federal laws deterring fraud in investments markets. While those laws were bitterly resisted at the time of their enactment in the 1930s, the investments industry has long since come to the recognition that such laws are indispensable to their market. For that reason, allowing the securities and commodities exchanges to function as self-governing through a system of private arbitration evaluating fraud claims makes sense on all sides. However, the mandatory extension of securities industry arbitration to issues such as gender discrimination claims is quite a different matter.

27. See discussion *infra* Part III.

Lawyers who write the forms are not justified in zeal blind to consequences, and they are in serious danger of becoming parties to the overreaching of their clients.

In the hope of easing the odium of my moral pretensions, I have a confession to make. In 1955, I commenced the practice of law with a Dallas firm. A client of the firm sold bicycles. He thought he would sell more bicycles if he staged a bicycle race. Someone invited me to explain to him his possible tort liability. Texas law did not seem to be entirely clear as to his liability if two racing cyclists collided and were injured in the collision. In Dallas in 1955 only adolescents rode bikes, so this would be a race in which only minors would participate. It occurred to me that a disclaimer of liability would be advantageous for the client. However, parents asked to sign a disclaimer might not only refuse to sign, but might forbid their kids to race. I therefore conceived the idea of having the young competitors themselves sign waivers. The waivers would be invalid on account of the age of the signers, but they and their parents might not know that, and by making them sign, the client could materially reduce the likelihood that he would experience tort liability. I drafted a waiver form and sent it to the client for use. The kids signed, the race was held, and no one was hurt.

No one, that is, save me. At the time I wrote the contract, it did not cross my mind that I was serving as a tool of deceit and injustice. Intuitively, I had embraced and practiced a professional morality expressed by David Dudley Field, the spectacular nineteenth-century Manhattan lawyer who affirmed that it was his duty to do for his clients whatever it was not unlawful for them to do for themselves.²⁸ There was no law in Texas explicitly forbidding my client to secure invalid waivers from kids participating in his race. I therefore

28. See correspondence of David Dudley Field and Dudley Field with Samuel Bowles, (Dec. 27, 1870 to Jan. 13, 1871), *reprinted in* ANDREW L. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 424-44 (2d ed. 1984). For comment on the correspondence, see Michael Schudson, *Public, Private, and Professional Lives*, 21 AM. J. LEG. HIST. 191 (1977). A professional morality similar to Field's is expressed by Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L. J. 1060 (1976).

assumed that he would want to maximize profits by deceiving them and their parents in that way.

It now seems to me that there were at least two things deeply wrong with my assumption. First, it resulted in my using my professional skill (if that is what it was) to the unjust disadvantage of uninformed adolescents and their parents. It was my free choice to use my professional knowledge in that way. I was under no contractual or professional duty to prepare a waiver form. If David Dudley Field imposed such duties on himself, that was his moral choice. Perhaps he held himself out to prospective clients as one who would ruthlessly advance their interests by every means not punishable by law. He was known to his colleagues at the bar as a man who rapaciously served rapacious clients. But I had not held myself out in that way; few lawyers have. We have no professional obligation to be rapacious.

Secondly, the moral issue presented by the use of an invalid waiver was not mine to decide in the first instance, but was the client's. I had no right to assume, as I did, that money was his only measure of value. If the client had raised the possibility of a waiver and upon hearing my legal advice had then made an informed choice that he wanted to get the kids to sign an invalid waiver, then the moral issue would have been returned to me, to decide whether I wanted or needed to spend my time and meager talent to provide the requested instrument. Such a fully informed choice by the client would be one in which ethical as well as legal considerations had been presented by me and considered by him. By informing him on the ethics as well as the law, I could have placed the primary moral responsibility where it belongs, on him. There are, however, many individuals, including even many prosperous businessmen, who would not, on reflection, wish to pursue their monetary interests by reprehensible means. Many bicycle dealers would, on mature reflection, choose to forego the conduct of a bike race or would bear the cost of insurance coverage rather than create the false appearance of non-liability.

Third, my release was a fraud. Fraud is a tort and can be a crime.

It now seems clear that my conduct was a breach of professional responsibility and tortious. I was myself in this sense a party to the form contract I wrote. Had a participant in the race been hurt, and had his claim to compensation been impeded in any way by my form, I was and should have been morally and legally accountable for what I did.

III. BELLS AND WHISTLES MAKING ARBITRATION CLAUSES UNCONSCIONABLE

I turn to a more current example involving an arbitration clause. Such clauses are in high fashion because of the “national policy favoring arbitration” that has been created by the Supreme Court, a policy to be distinguished from a non-existent national policy favoring self-deregulation.²⁹

St. Clair Adams went to work for Circuit City in 1995.³⁰ As a condition of his employment, he was required to sign a Dispute Resolution Agreement containing an arbitration clause.³¹ In 1997, Adams sued Circuit City in state court alleging that he had been constructively discharged by repeated harassment over his sexual orientation in violation of the California Fair Employment and Housing Act³² and the California Labor Code.³³ In federal court, Circuit City secured a stay pending arbitration, invoking the Federal Arbitration Act as preemptive of the California laws. That stay was set aside by the Ninth Circuit on the ground that the Federal Arbitration Act did not apply to employment agreements such as that between Adams and Circuit City.³⁴ Last term, the Supreme Court of the United States reversed that decision, holding that the exclusion of employment agreements in the text of the federal law should be

29. This national policy favoring arbitration was stated in *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984), and was recently followed in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56 (1995).

30. *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070, 1071 (9th Cir. 1999).

31. *Id.*

32. CAL. GOV'T CODE §§ 12900-06 (West 1992).

33. CAL. LAB. CODE § 1102.1 (West 1992).

34. *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999).

narrowly construed to apply only to transportation workers.³⁵ On remand, the court of appeals considered the alternative contention of Adams and held the Dispute Resolution Agreement to be unconscionable and invalid as a matter of California law and ordered the district court to dismiss the case, leaving Adams free to pursue his remedies in state court.³⁶

The arbitration clause was indeed unconscionable because of the bells and whistles it included. The Circuit City agreement required Adams to arbitrate any claim he might have against it, while it was under no such constraint with respect to any claim it might assert against him.³⁷ Adams was required to pay half the cost of any arbitral proceeding, including the filing fee, the daily fee of the arbitrator, and the fee of a reporter, costs he would not have borne in litigation.³⁸ He was required to assert any claim within a year of its accrual instead of the longer period allowed by state law.³⁹ And any damage remedy would be limited in amount and exclude punitive damages.⁴⁰ These extra provisions made the predispute arbitration clause unconscionable. The court of appeals referred to them as a heavy thumb on the scale making it unlikely that Adams would be able to enforce any rights that the California legislature had conferred upon him.⁴¹ The effect of the court of appeals decision was to reinstate the full settlement value of his claim and restore his role as a private attorney general to enforce the state's anti-discrimination laws. The United States Supreme Court denied certiorari.⁴²

Similar bells and whistles, including a short statute of limitations, restrictions on remedies, and elevated costs appear in the arbitration clause in the standard form contract AT&T recently sought to impose on its California customers for long distance service. The added

35. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

36. *Circuit City Stores v. Adams*, 279 F.3d 889 (9th Cir. 2002). *Cf. Armendariz v. Foundation Health Psychare Services, Inc.*, 6 P.3d 669 (Cal. 2000).

37. *Circuit City Stores*, 279 F.3d at 894.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 895.

42. *Circuit City Stores v. Adams*, 122 S. Ct. 2329 (2002).

features led the judge deciding a suit challenging the terms of that contract to conclude that:

This lawsuit is not about arbitration. If all AT&T had done was to move customer disputes that survive its informal resolution process from the courts to arbitration, its actions likely would have been sanctioned by the state and federal policies favoring arbitration. While that is what it suggested it was doing to its customers, it was really doing much more; it was actually rewriting substantially the legal landscape on which its customers must contend. . . . It is not just that AT&T wants to litigate in the forum of its choice – arbitration; it is that AT&T wants to make it very difficult for anyone to effectively vindicate her rights, even in that forum. That is illegal and unconscionable and must be enjoined.⁴³

In another recent case,⁴⁴ a motel chain wrote into its franchise agreement form a provision requiring that all franchisees arbitrate any dispute with the franchisor at the place of the chain's headquarters in Maryland. The effect of that provision was to disable a Montana motel from contesting any issue arising out of its relationship with the chain, save perhaps a franchise termination. Under Montana law, such a forum selection clause imposing such inconvenience on a citizen is unconscionable and to that extent invalid. The Ninth Circuit, applying Montana law, held that any arbitration must be held in Montana.⁴⁵ The Supreme Court denied certiorari in 2002.⁴⁶ Arguably, the entire arbitration clause should have been held void, as was the clause in *Circuit City*, to discourage the risk-free inclusion of overbearing terms in such a clause.⁴⁷

43. *Ting v. AT&T*, 182 F. Supp. 2d 902, 938 (N.D. Cal. 2002).

44. *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 935 (9th Cir. 2001), *cert. denied*, 2002 U.S. LEXIS 725 (2002). *Cf.* *Kloss v. Edward D. Jones & Co.*, 2002 Mont. Lexis 223 (Mont. 2001).

45. *Ticknor*, 265 F.3d at 939.

46. *Choice Hotels Int'l, Inc. v. Ticknor*, 122 S. Ct. 1075 (2002).

47. *In re Managed Care Litigation*, 132 F. Supp.2d 989 (S.D. Fla. 2000) (refusing to allow the party who wrote the arbitration clause to waive its unconscionable features). The court stated

The Seventh Circuit also held in 2002 that an arbitration agreement was void because it was linked to an unconscionable provision inconsistent with the plaintiff's right to recover counsel fees on a successful Title VII claim.⁴⁸ The court did not need to consider the other provisions in that agreement that required the Title VII plaintiff to pay half the arbitrator's fee, win or lose.

The United States Court of Appeals for the District of Columbia has addressed the demerits of such bells and whistles in the context of arbitration of employment discrimination claims and has affirmed that some features of traditional American commercial arbitration practice must be modified when arbitration is used to resolve statutory claims of employees.⁴⁹ While enforcing the arbitration agreement, the court insists that plaintiffs enforcing such laws are entitled to "procedural due process." These "minimal standards of due process" require, for example, that the arbitrator be a lawyer schooled in the pertinent law who would write an opinion subject to judicial review.⁵⁰

In an effort to compel arbitration and dismiss the instant action against Drs. Porth and Kelly, United has expressed a willingness to waive the arbitration clauses' limitations that prevent an arbitrator from awarding extra contractual damages and punitive or exemplary damages. Principles of justice and fair play, however, lead to the conclusion that one party unilaterally cannot alter post litem motam terms of an agreement so that a case is dismissed The Court rejects United's attempted waiver.

Id. at 1001. See also *Flyer Printing Co. v. Hill* 805 So.2d 829 (Fla. App. 2001). The court there observed

Flyer Printing points out that it offered to pay all the costs of arbitration notwithstanding the language of the agreement. Hill rejected this unilateral offer to amend the agreement, however, and we are not authorized to remake the parties' contract.

Rather, Friedman's et al., by tying substantively unconscionable exculpatory and limitation of liability provisions to an arbitration provision in a form contract of adhesion, has sought to unilaterally use (one could say "misuse") the honorable mechanism of arbitration—that has found a respected place in the commercial life of our nation—as a scheme or mechanism to shield itself from legal accountability for misconduct

Under such circumstances, we think a court doing equity should not undertake to sanitize any aspect of the unconscionable contractual attempt.

Id.

48. *McCaskill v. SCI management Corp.*, 294 F.3d 897 (7th Cir. 2002).

49. *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997).

50. *Id.* at 1483; cf. *Shankle v. B-G Maint. Mgmt. of Colorado, Inc.*, 163 F.3d 1230 (10th Cir. 1999) (requiring employers to provide convenient forum); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) (holding that due process requires neutral arbitrator). See also Robert A. Gorman, *The*

Also, the Supreme Court has explicitly acknowledged the unenforceability of arbitration clauses imposing additional costs on individuals seeking to enforce their rights, whether they are statutory rights or contractual rights.⁵¹ That acknowledgement would seem to endorse the Ninth Circuit's refusal to require the Montana motel to take its claim to Maryland to be resolved there.

It can be safely assumed that a clause in a printed form that empowers the defendant to select the arbitrator will not be enforced. Such provisions are not as rare as one might suppose.⁵² The Supreme Court of Alabama, an institution not given to assaults on freedom of contract as practiced by business enterprise invalidated one such clause in 2002, dismissing the argument of the mobile home firm drafting the form that the rules of the American Arbitration Association were a sufficient guarantee of fairness.⁵³ The Supreme Court of North Carolina has recently denied enforcement to a clause written into a health care form by the Duke University Medical Center; that clause purported to reach claims arising out of health care antedating the hospital care and was signed by the patient's spouse who, the court held, had no authority to bind her husband to arbitrate a pre-existing dispute.⁵⁴ The Arkansas Supreme Court has held that an arbitration clause in an agreement between a payroll check cashing service and its patron was unconscionable because it

Gilmer Decision and the Private Adjudication of Public-Law Disputes, 1995 U. ILL. L. REV. 635, 645 (1995).

51. *Green Tree Fin. Corp. of Ala. v. Randolph*, 531 U.S. 79 (2000). A useful example is provided by *Shankle v. B-G Maintenance Management of Colorado*, 163 F.3d 1230, 1234-1235 (10th Cir. 1999), where the court found that:

In order to invoke the procedure mandated by his employer, however, Mr. Shankle had to pay for one-half of the arbitrator's fees. Assuming Mr. Shankle's arbitration would have lasted an average length of time, he would have had to pay an arbitrator between \$1,875 and \$5,000 to resolve his claims. Mr. Shankle could not afford such a fee, and it is unlikely other similarly situated employees could either. The Agreement thus placed Mr. Shankle between the proverbial rock and hard place - it prohibited use of the judicial forum, where a litigant is not required to pay for a judge's services, and the prohibitive cost substantially limited use of the arbitral forum.[citation omitted.]

52. Leslie Kaufman & Anne Underwood, *Sign or Hit the Street*, NEWSWEEK, June 30, 1997, at 48.

53. *Harold Allen's Mobile Home Factory Outlet, Inc. v. Butler*, 2002 WL 64647 (Ala. 2002).

54. *Milon v. Duke University*, 559 S. E. 2d 789 (N.C. 2002).

bound the patron but not the service.⁵⁵ The West Virginia Supreme Court has held invalid an arbitration clause invoked to forestall a class action brought to correct a course of business fraud by a credit jeweler.⁵⁶ The Montana Supreme Court has invalidated an arbitration clause in a from contract between a broker and an elderly investor.⁵⁷ We do not know, of course, how many mobile home buyers in Alabama or medical malpractice victims in North Carolina or check cashers in Arkansas were intimidated by clauses later held unconscionable and accepted settlements they might otherwise have rejected. In all of these cases, the arbitration clauses invalidated contained “bells and whistles” increasing the costs of rights enforcement or making it less likely that a claim could succeed. No instance has been encountered of a business writing a standard form giving an advantage to its customers or workers in a future dispute.

Some laws can be effectively enforced only by class actions. The Truth in Lending Act⁵⁸ appears to be such a law. Few borrowers can prove damages resulting from a violation of the law.⁵⁹ On that account, the statute provides explicitly for penalties to be enforced by class actions. Some lawyers representing lenders have perceived that they might defeat enforcement of the act by writing arbitration clauses into loan agreements, thereby barring each borrower from participating in a class action in court. At least one federal court has sanctioned this practice.⁶⁰ But courts more attentive to what is happening and faithful to the controlling state law of contracts should

55. *Cash in a Flash Advance of Ark., L. L. C. v. Spencer*, 2002 WL 937683 (Ark. 2002).

56. *State ex rel. Dunlap v. Berger*, 567 S. E. 2d 205 (W. Va. 2002); *See also State ex rel. United, Inc. v. Sanders*, 511 S. E. 2d 134 (W. Va. 1998).

57. *Kloss v. Edward D. Jones & Co.*, 2002 Mont. Lexis 223 (Mont. 2001).

58. Truth in Lending Act (TILA), 15 U.S.C. §§ 1601 et seq. (2002). This is also true of numerous state laws. *See, e.g.* the West Virginia law enforced in *State ex rel. Dunlap v. Berger*, *supra* note 56.

59. *See generally* Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237 (2001); Richard B. Cappalli, *Arbitration of Consumer Claims: The Sad Case of Two-Time Victim Terry Johnson or Where Have You Gone Learned Hand?*, 10 B.U. PUB. INT'L L.J. 366 (2001); Christina Lewis, Note, *Class Actions vs. Arbitration: Does TILA Support Class Actions in Arbitration Where Statutory Rights Are Concerned*, 2001 J. DISP. RESOL. 133 (2001); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000).

60. *Johnson v. W. Suburban Bank*, 225 F.3d 366 (3d Cir. 2000), *cert. denied sub nom. Johnson v. Tele-Cash, Inc.*, 531 U.S. 1145 (2001).

not allow an arbitration clause to prevent participation of borrowers in class actions indispensable to the enforcement of their rights under Truth in Lending laws.⁶¹ To the extent that an arbitration clause prevents enforcement of the law, it is unconscionable even though it contains no language explicitly foreclosing participation in class actions. A possible solution is an aggregation of individual arbitrations before a single arbitral tribunal.

Thus, while some lower federal courts have been inattentive to the unacceptable consequences of some unconscionable bells and whistles written into arbitration clauses, it seems increasingly clear that the national policy favoring arbitration does not establish a principle of freedom of contract entitling businesses to self-deregulate by means of unconscionable terms in dispute resolution clauses.

IV. PROFESSIONAL DISCIPLINE OF DRAFTSMEN

Could the lawyers writing objectionable standard form contracts be subject to professional discipline? The Preamble to the Model Rules of Professional Conduct affirms that “[a] lawyer should be mindful . . . that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance.”⁶² As suggested, it is not clear that Samuel Williston could afford his own legal assistance to interpret and assess the legal consequences of all the adhesion contracts he would encounter in today’s world. Rule 1.2 of the Model Rules also exposes to professional discipline lawyers who engage in unlawful activities.⁶³ Possibly such conduct might include the imposition of invalid and unconscionable provisions on unwary citizens. Moreover even a valid contract may be an instrument in an unlawful activity such as a violation of antitrust or securities laws, or RICO.

61. Some federal courts, in their haste to enforce arbitration clauses, have been prone to disregard the state law of contracts controlling pursuant to Section 2 of the Act. Charles Davant IV, Note, *Tripping on the Threshold: Federal Courts’ Failure to Observe Controlling State Law Under the Federal Arbitration Act*, 51 DUKE L.J. 521 (2001).

62. MODEL RULES OF PROF’L CONDUCT, pmbi. para. 6 (2002).

63. *Id.* at R. 1.2(d) (2002).

However, no language in the text of the ABA's Model Rules of Professional Conduct appears explicitly to authorize professional discipline on lawyers who write unconscionable contracts. The Kutak Commission that drafted the Model Rules proposed a prohibition against a lawyer assisting a client to conclude an agreement "that the lawyer knows or reasonably should know is illegal, contains legally prohibited terms, would work a fraud, or would be held to be unconscionable as a matter of law."⁶⁴ The latter term was intended to incorporate into the Rules the standard of Section 2-302 of the Uniform Commercial Code. It was criticized as too indeterminate to serve as the standard for quasi-criminal professional discipline.⁶⁵ Perhaps that was the reason the provision was deleted in the final draft of the Rules.

Rule 1.2 of the Model Rules forbidding lawyers to participate in unlawful activities echoes the older Code of Professional Responsibility Rule 7-102.⁶⁶ It is elaborated in Rule 8.4 forbidding "conduct involving dishonesty, fraud, deceit, and misrepresentation."⁶⁷

The *law* of professional discipline was scant in the years antecedent to 1960. However, Canon 15 of the Canons of Professional Ethics promulgated by the ABA in 1908 exhorted lawyers to refrain from assisting their clients in fraud or chicanery. The latter term was certainly broad enough to encompass the drafting of unconscionable provisions that disable parties from enforcing their substantive rights. I have found one case decided under the Canon that disciplined a lawyer for drafting a usurious note.⁶⁸

These provisions and the case cited reflect a longstanding tradition of professional morality observed by many honored American lawyers. George Wythe, the Virginia lawyer who taught Jefferson,

64. *Id.* at R. 4.3 (Discussion Draft, Jan. 30, 1980).

65. Geoffrey C. Hazard, Jr., *The Lawyer's Obligation to Be Trustworthy with Opposing Parties*, 33 S.C. L. Rev. 81 (1981); Gary T. Lowenthal, *A General Theory of Negotiation, Process, Strategy and Behavior*, 31 U. KAN. L. REV. 69, 103-05 (1982).

66. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(7) (1986).

67. MODEL RULES OF PROF'L CONDUCT, R. 8.4(c) (2002).

68. *In re Young*, 225 N.W. 97, 98 (Minn. 1929).

Marshall, and Clay, was famous for dismissing clients of whose conduct he disapproved; it was said that “no dirty coin ever got to the bottom of his pocket.”⁶⁹ David Hoffman, writing in Baltimore in 1817, insisted that “[m]y client’s conscience and my own are distinct entities; and . . . I shall ever claim the privilege of judging to what extent to go.”⁷⁰ My client, he said, “shall never make me a partner in his knavery.”⁷¹ Timothy Walker, speaking in Cincinnati in 1839, counseled that a lawyer should never advise a client contrary to his own moral conviction.⁷² George Sharswood, writing in Philadelphia in 1854, strongly cautioned against the subordination of a lawyer’s moral judgment to a client’s interest or desire.⁷³ Walker explained to novitiates the importance of living within their means so that their clients would not have irresistible power over them. Thomas Cooley, speaking as President of the American Bar Association in 1893, counseled its members on their professional duty to restrain their employer-clients from abusing their economic power over their workers.⁷⁴

Louis Brandeis conducted a law practice in Boston for forty years that established a standard of professional responsibility for corporate lawyers;⁷⁵ we can be sure that he wrote no adhesion contracts attempting to strip workers or consumers of their ability to enforce their rights. His published thoughts on the responsibility of the duties of business lawyers echoed the earlier remarks of Thomas Cooley.⁷⁶ Indeed, he expressed contempt for lawyers who lobby legislatures to advance the selfish interests of their clients against what they must surely know to be contrary are the interests of the unrepresented members of the public who is the other parties to form contracts. Despite his restraint in such matters, Brandeis attracted an enormous

69. IMOGENE E. BROWN, *AMERICAN ARISTIDES: A BIOGRAPHY OF GEORGE WYTHE* (1981).

70. DAVID HOFFMAN, 2 *A COURSE OF LEGAL STUDY ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY* 755 (2d ed. 1817).

71. *Id.* at 750.

72. Timothy Walker, *Ways and Means of Professional Success*, 1 W. L.J. 542, 547 (1843).

73. MICHAEL D. BAYLES, *PROFESSIONAL ETHICS* 81 (1981).

74. *Address of the President*, 17 A.B.A. REP. 181 (1894).

75. See generally PHILIPPA STRUM, *BRANDEIS: BEYOND PROGRESSIVISM* (1993).

76. LOUIS D. BRANDEIS, *BUSINESS – A PROFESSION* (1914).

clientele of businessmen who placed a very high value on his professional advice.

In forbidding lawyers to participate in their clients' illegal activities, the Model Rules of 1983 and the Disciplinary Code of 1963 seem to leave room for courts to reprimand lawyers who assist their clients in an effort to self-deregulate by writing overbearing dispute resolution clauses into standard form contracts that are unconscionable and thus unlawful within the meaning of the Restatement of Contracts or the Uniform Commercial Code.⁷⁷ Such discipline would be consistent with the traditions of professional honor.

However, another tradition of law practice is reflected in my own deplorable behavior in 1955. I mentioned the ethics of David Dudley Field who became a very rich lawyer by doing anything for his clients that they would not be punished for doing themselves, even when there was no professional adversary to question or contest the deeds he performed for his clients. Field was widely suspected of doing even a bit more than his clients would have dared, of pushing the ethical envelope to the limit, in the belief and knowledge that other lawyers and judges would be reluctant to condemn his conduct without proof of deliberate wrongdoing of utmost clarity. It was nevertheless on account of his conduct that Field was only belatedly and reluctantly permitted to join the Association of the Bar of New York and was not invited to join in the founding of the American Bar Association.⁷⁸

Field's view of his professional responsibility had English ancestry in a famous utterance by Henry Brougham, who was like Field a notable law reformer as well as a fierce advocate. Brougham was explaining his defense of a person charged with a capital offense when he said that the "highest and most unquestioned" duty of the advocate was to advance the interests of his client by "all means and expedients," and "he must not regard the alarm, the suffering, the

77. See U.C.C. § 2-302 (2002); RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981).

78. See generally DAUN VAN EE, DAVID DUDLEY FIELD AND THE RECONSTRUCTION OF THE LAW (1974).

torment, the destruction which he may bring upon others. Separating the duty of the patriot from that of the advocate, he must go on reckless of consequence, though it should be an unhappy fate to involve his country in confusion."⁷⁹ It is, however, important that Brougham was a Barrister, and thus not what today would be called a transaction lawyer. He could assume that his unrestrained advocacy would be met in court by unrestrained advocacy on the other side of the case. As Brandeis insisted, the model of the lawyer as fearless combatant simply has no bearing on the circumstances in which lawyers employ their talents to the detriment of *unrepresented* interests.⁸⁰

Expressing the ethics of Brandeis and the others named, and foretelling the conduct of contemporary draftsmen of adhesion contracts, President Theodore Roosevelt denounced the many members of the bar who made it "their special task to work out bold and ingenious schemes by which their very wealthy clients . . . can evade the laws which are made [to control] the use of great wealth!"⁸¹ This comment brought a response from Moorfield Storey, a Boston lawyer who was at the time the President of the American Bar Association. Storey was a founder of the NAACP and perhaps the primary critic of Roosevelt's imperial policies in the Philippines and Panama. In responding to Roosevelt's accusation, Storey explained that he and other business lawyers were merely telling their clients what the law permits. "This is not evading, but obeying the law."⁸² Citing Lincoln, he protested that such reverent obedience to the law should be "the political religion of the nation."⁸³

No doubt many good and honorable lawyers—Storey was such a one—have beguiled themselves with this sort of rhetoric into the belief that it is their professional duty to practice law as David Dudley Field did, even if that entails writing oppressive forms

79. TRIAL OF QUEEN CAROLINE 3 (Jersey City, F.D. Linn & Co. 1879) (speech of Brougham in defense of the Queen).

80. BRANDEIS, *supra* note 82.

81. See MOOREFIELD STOREY, THE REFORM OF LEGAL PROCEDURE 17 (New Haven 1911).

82. *Id.* at 20.

83. *Id.* at 1.

purporting to be contracts expressing the mutual assent of parties, and who take pride in telling their business clients what they can get away with rather than telling them only what is prohibited.

Lawyers who follow the Field principles of ethics are no doubt correct that other influential and powerful lawyers would be reluctant to challenge their ethics. Even though the writing of unconscionable contracts could be the subject of discipline under the Code, discipline remains a remote possibility. Discipline committees are for the most part governors of the practices of lawyers who represent individuals and are seldom interested in the conduct of lawyers who represent institutions. They have perhaps enough to do in disciplining lawyers who betray their individual clients. Moreover, even if a grievance committee did recommend disciplinary action to the courts, many judges would shudder with the thought that they, like myself, may at times past have been guilty of similar transgressions against unrepresented persons. For these practical political reasons, big law firms representing big clients need not much fear discipline committees if all they do is assist their clients in abusing their economic power.

V. MALPRACTICE IN DRAFTING UNCONSCIONABLE CONTRACTS

Lawyers who write unconscionable provisions in contracts of adhesion, like those who draft invalid waivers to be signed by minors, may be more exposed to tort liability than to professional discipline. First, they may be guilty of professional negligence harmful to their own clients. Earlier decisions of state and federal courts sitting in California or Montana made it foreseeable that the contracts written for Circuit City or AT&T or the motel chain would be determined to be unconscionable and unenforceable.⁸⁴ Perhaps their clients were so advised and stubbornly insisted on loading up their contracts with provisions that would (if enforced) effectively

84. See, e.g., *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir. 1994); *Hope v. Superior Court of Santa Clara County*, 175 Cal. Rptr. 851 (1981); *Wheeler v. St. Joseph Hosp.*, 133 Cal. Rptr. 775 (1976).

disable their prospective adversaries from enforcing their rights, or would at least greatly diminish the settlement value of any such claims. But it seems more likely that these lawyers poorly advised their clients. The consequential damages for this malpractice would include not only the cost of fees expended in defending the indefensible, but also compensation for the intangible harm inflicted on the reputations of the client firms for their participation in unconscionable behavior.

The defense against malpractice liability would rest on the fact that the self-deregulation gambit attempted by Circuit City and by AT&T has sometimes worked, at least in jurisdictions other than California. The lawyers and company management may have been inspired, for example, by the occasional success of Gateway Computers.⁸⁵ That company emerged as a player in the personal computer market by conducting its business on the telephone. If you wanted to buy a widely advertised computer from them, you would call a phone number in South Dakota. A polite voice would take your order and credit card number, and in a few days, a box resembling a cow would arrive at your door. It would likely contain the computer you ordered. In the bottom of the box would be a document labeled "terms." Of course, anyone ordering a computer would expect the seller to stand behind it and would assume that the computer was of merchantable quality. Only a person with time as well as a new computer on her hands or possessed of a morbid curiosity and confidence in her ability to comprehend legal discourse would read the written terms of sale unless and until he or she became motivated by dissatisfaction with the product. Gateway and its lawyers surely knew this. If anyone did read the warranty, they found that they could return the computer for any reason but only if they did so in a short time. Otherwise, they would have to make a claim that would be arbitrated in Chicago.

85. The motel chain lawyer may have been inspired by *Doctor's Assocs. Inc. v Casarotto*, 517 U.S. 681 (1996), in which a similar provision was enforced against a Montana Subway franchisee. In that case, however, no argument was advanced on the basis of Montana contract law applicable pursuant to Section 2 of the Federal Arbitration Act.

The Hills, living in Arkansas, ordered a Gateway computer. When their computer failed a few months after it arrived, they sought relief. Gateway succeeded in getting the United States Court of Appeals for the Seventh Circuit to order the district court to compel the Hills to arbitrate in Chicago in compliance with the terms imposed by the insert in the bottom of the box. As a consequence, the implied warranty of merchantability was as a practical matter unenforceable and illusory. To enforce it, the Hills would need to find and employ a Chicago lawyer, pay the administrative fee of an ADR institution, and pay at least some of the other costs of the proceedings. One who purchases a two thousand dollar computer cannot afford to proceed in a distant forum unless much more is at stake than the cost of the computer itself. Such a contract might well, in deed should, be deemed unconscionable under the law of California or many states, or indeed, under Section 2-302 of the Uniform Commercial Code or under the general Arkansas law of contracts.⁸⁶ That possibility was not considered by the Seventh Circuit in the case mentioned. That court, waxing on the glories of freedom of contract and the solemn duty of consumers to investigate the bottom of the containers in which their goods arrive, held that Arkansans aggrieved about the quality of a two thousand dollar purchase must find a lawyer in Chicago if they wish to pursue a claim against the seller Gateway.

Even had they lost their case with the Hills, Gateway or a similarly situated client would be unlikely to sue its lawyer for damages resulting from an excess of professional zeal. Few clients regret having Rambo for their lawyer.

VI. LAWYER LIABILITY TO VICTIMS OF UNCONSCIONABLE TERMS

While the Gateway example may provide a basis for doubt about my assertion that the lawyers for Circuit City and AT&T should have known better than to write the provisions they did, it also raises the question whether a lawyer writing such a deceptive warranty into a

86. See, e.g., *Cash in a Flash Advance of Ark., L.L.P. v. Spencer*, 2002 WL 937683 (Ark. 2002).

client's unconscionable contract might himself or herself be liable to the third party who is the victim of the client's predatory behavior.⁸⁷ The late and revered Alvin Rubin affirmed that, just as a lawyer cannot assist a client in committing a crime, so he or she has no right and no duty to assist a client in unconscionable conduct.⁸⁸

A warranty as illusory as a Gateway warranty might be deemed not only unconscionable but also "deceptive" within the meaning of the Magnuson-Moss Act of 1975.⁸⁹ The Act defines the term to mean

(A) a written warranty which (i) contains an affirmation, promise, description, or representation which is either false or fraudulent, or which, in light of all of the circumstances, would mislead a reasonable individual exercising due care; or (ii) fails to contain information which is necessary in light of all of the circumstances, to make the warranty not misleading to a reasonable individual exercising due care; or (B) a written warranty created by the use of such terms as "guaranty" or "warranty", if the terms and conditions of such warranty so limit its scope and application as to deceive a reasonable individual.⁹⁰

While the Magnuson-Moss Act does not seem to authorize federal court damage actions against lawyers who write "deceptive warranties,"⁹¹ the law of many states does hold lawyers accountable for the acts of their clients if they are actively involved in the

87. See generally RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 (2000).

88. Alvin B. Rubin, *A Causerie of Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577 (1975).

89. 15 U.S.C. §§ 2301-12 (2002).

90. *Id.* § 2310(c)(2).

91. Section 2310(f) provides:

Warrantors subject to enforcement of remedies. For purposes of this section, only the warrantor actually making a written affirmation of fact, promise, or undertaking shall be deemed to have created a written warranty, and any rights arising thereunder may be enforced under this section only against such warrantor and no other person.

That text was surely written not to bar claims against lawyer malefactors, but to protect local retailers who make no representations regarding the goods they sell. But there has been reluctance to infer secondary liability on persons not explicitly regulated by federal legislation. *E.g.*, *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994).

perpetration of fraud,⁹² and federal law may be used to define fraud in a state law action.⁹³ While lawyers may be protected from liability to third parties for the *negligence* of their clients by a requirement of privity of contract,⁹⁴ they are not generally protected from liability when they participate in a client's intentional tort such as fraud.⁹⁵

In measuring the possible liability for lawyers who write standard form contracts, it is important to distinguish between advising a client that a particular term in a form contract might not be unconscionable and serving the client by drafting an unconscionable provision intended to impede enforcement of citizens' rights.⁹⁶ Drafting the instrument effecting the harm is the step beyond advice that would expose the lawyer to possible liability for the consequences of misdeeds in which he or she actively participated.

Thus, the Magnuson-Moss definition of deceit might be suitably employed as a standard of conduct to be imposed on a lawyer-draftsman in a tort action under state law. As noted, that statute envisions enforcement in class actions, and one can imagine a state law class action against the law firm that drafted the Gateway clause rendering the warranty on the computers to be "deceptive." While there may be statutory impediments to professional liability in some

92. *E.g.*, *Stochastic Decisions, Inc. v. DiDomenico*, 995 F.2d 1158 (2d Cir. 1993); *Hartford Accident & Indem. Co. v. Sullivan*, 846 F.2d 377 (7th Cir. 1988); *Bonavire v. Wampler*, 779 F.2d 1011 (4th Cir. 1985); *Chase Manhattan Bank, N.A. v. Perla*, 411 N.Y.S.2d 66 (App. Div. 1978); *Reiner v. Kelley*, 457 N.E.2d 946 (Ohio Ct. App. 1983); *Jeska v. Mulhall*, 693 P.2d 1335 (Or. Ct. App. 1985); *Gen. Res. Org., Inc. v. Deadman*, 907 S.W.2d 22 (Tex. Civ. App. 1995); *cf. Robinson v. Volkswagenwerk AG*, 940 F.2d 1369 (10th Cir. 1991) (holding that if an attorney shares illegal motives with his client, he may be liable).

93. Compare use of auto safety standards in products liability cases. *E.g. Seese v. Volkswagenwerk A.G.*, 648 F.2d 833 (3d Cir. 1981).

94. *E.g.*, *Greycas, Inc. v. Proud*, 826 F.2d 1560 (7th Cir. 1987). But see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §51 (2000). And see Roger C. Cramton, *Furthering Justice by Improving the Adversary System and Making Lawyers More Accountable*, 70 Fordham L. Rev. 1599, 1613 (2002): ("It is ironic that a profession which opposes any restrictions on tort liability for physicians or others is so worried about the negligence standard to itself.")

95. *Newburger, Loeb & Co. v. Gross*, 563 F.2d 1057 (2d Cir. 1977).

96. Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 686 (1978).

states,⁹⁷ one can imagine an award of punitive damages against Gateway's lawyer.

I have found no statute comparable to the Magnuson-Moss Act that would denote as *fraudulent* the behavior of the lawyer who wrote the Dispute Resolution Agreement into the *employment* agreement for Circuit City. But perhaps this is an arena in which some judge-made law might be developed to expose lawyers to civil liability when they write form contracts that are unlawful.

Such misconduct bears a resemblance to that of lawyers who participate in a conspiracy of silence to prevent public notice of the risks associated with a particular product by negotiating settlements conditioned on silence by the plaintiff and her lawyer.⁹⁸ Such conspiracies of silence injure later purchasers who would have avoided harm had they known of the harms experienced by others. If the client has a duty to warn purchasers of harms experienced by earlier consumers, the lawyer who actively negotiates a silent settlement is an active participant in the public deceit of the client. He or she is *willfully* creating a risk that some person *unrepresented* at the negotiation will experience serious harm.

Other state and federal laws regulating freedom of contract also impose shared civil liabilities on business clients and their lawyers where it can be demonstrated that the lawyers were actively engaged in violations of statutory restraints on commercial predation. Some of these laws may be offended by overbearing adhesion contracts. These include antitrust laws,⁹⁹ securities laws,¹⁰⁰ RICO,¹⁰¹ or other laws enacted to protect small business from the predatory conduct of big business, and to protect investors, workers, and consumers.¹⁰² It is imaginable that borrowers having to fight their way through a

97. See, e.g., N.C. GEN. STAT. § 75-1.1 (b) (2000) ("but does not include professional services rendered by a member of a learned profession").

98. For comment on this problem, see Nicole Schultheis, *Court Secrecy: A Continuing National Disgrace*, 28 LITIG. 29 (2002).

99. See *Pinhas v. Summit Health Ltd.*, 894 F.2d 1024 (9th Cir. 1989).

100. See *Kline v. First W. Gov't Secs., Inc.*, 24 F.3d 480 (3d Cir. 1994).

101. See *Ikuno v. Yip*, 912 F.2d 306 (9th Cir. 1990).

102. See *Heintz v. Jenkins*, 514 U.S. 291 (1995); see generally RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 9.5 (4th ed. 1996).

predispute arbitration clause to impose a Truth in Lending penalty on a lender in a class action may also have a claim in intentional tort against the lawyer who wrote the clause for the evident purpose of depriving them of their substantive rights under that Act.

In addition, the Supreme Court has held that a lawyer cutting off an unrepresented party's right to due process of law might be guilty of violating that party's civil rights, thereby exposing himself to liability under federal civil rights laws.¹⁰³ One means by which that wrong might be committed by a lawyer is the drafting of an unconscionable dispute resolution clause.

In addition to tort liability, it is also imaginable that a lawyer invoking an unconscionable provision to impede a claim in federal court might experience a sanction under Rule 11 of the Federal Rules of Civil Procedure. If a lawyer can be sanctioned for presenting an affidavit that he or she should have known to be false,¹⁰⁴ the lawyer may perhaps also be sanctioned for invoking an arbitration clause that he or she should have known to be unconscionable.

Class suits against law firms might correct wrongs by lawyers who draft unconscionable form contracts and thus engage themselves in the wrongs of their clients.¹⁰⁵ The class in such an action might be all those citizens whose claims have been impeded by the bells and whistles added to arbitration clauses inserted into their form contracts. Thus, we can imagine a successful class action against the lawyers representing Circuit City; everyone who signed its Dispute Resolution Agreement was wronged by those lawyers. Even if they have never had a dispute with Circuit City, employees have been put in an intimidating situation that likely influenced relationships within their places of business. Anyone who settled a dispute with that

103. See 42 U.S.C. § 1983. Cf. *Wyatt v. Cole*, 504 U.S. 158, 178 (1992). See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 57(2) (2000); RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE*, *supra* note 102, at §§ 6.6-6.21.

104. *E.g.*, *Patsy's Brand, Inc. v. I.O.B. Realty, Inc.*, No. 98 CIV 10175(JSM), 2002 WL 59434 (S.D.N.Y. Jan. 16, 2002).

105. On the vicarious liability of the firm, see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 58 (2000).

employer almost surely settled on terms adversely influenced by the unconscionable agreement on the settlement value of their claims.

Perhaps a better avenue of correction than a class action would be a simple action by a single individual who was wronged and who might be awarded exemplary damages against the Circuit City lawyer sufficient to deter any other California lawyers from drafting such provisions. It is not beyond belief that a civil jury would see that such abusive dispute resolution agreements have become a way of life to which they and all of us have been subjected. They might also be persuaded that a large damages award is not only the best, but perhaps the only, means by which professional misconduct of this kind can be constrained. It would not be hard to make a closing argument to the jury that would have a fair chance of producing a verdict of size against a law firm profitably engaged in stripping citizens of their statutory rights.

As I noted earlier, a jury verdict against a firm would be the paradigmatic American way to deal with the problem. The ethical problem of unconscionable contracts is not one that the organized bar or the courts are capable of dealing with on their own. The bar and the courts are in a position similar to that of an administrative bureaucracy that is politically beholden to the industry that it was created to regulate. Much of the law restated by the American Law Institute as the law governing lawyers is enforced primarily or even exclusively by private lawsuits. This is necessarily so because independent lawyers and jurors are immune to the social and political pressures and influences that subvert other forms of control. So I conclude by toasting the lawyer who is the first to risk his professional energy and reputation to impose a substantial liability on an unconscionable law firm for writing unconscionable terms into a standard form contract.

APPENDIX: A DISPUTE RESOLUTION AGREEMENT

TO ALL PARTIES HAVING ACCESS TO THE INTERNET

WARRANTIES IN CONTRACTS MADE BY *JANE DOE*

This instrument is published on the Internet to state terms included in all contracts for the sale of goods or services to which *Jane Doe* is or may become a party. Its purpose is to provide equal protection to all parties with whom she deals and to assure the prompt and inexpensive resolution of any dispute that might arise in the course of her dealings.

Equal Protection of the Law. These terms are expressed to assure Equal Protection of the Law to all persons or firms dealing with Jane Doe. She and all such persons or firms are by this instrument assured an equal opportunity to assert without needless cost or delay any rights arising out of any contract to which she is a party. These terms displace any contrary terms in any printed form that may have been or may in the future be circulated by her or by any person or firm to whom she has provided or will provide services or from whom she has acquired or will acquire goods or services except those contrary terms that have been or are in the future specifically acknowledged by the signature of the person or firm against whom they are invoked. Specifically, these terms displace any terms to which any party with whom she has made or will make a contract might be said to have assented by a failure to correct unwelcome terms prescribed in printed tickets, circulars, health care forms, package inserts, bill enclosures, notes transmitted electronically as the supposed terms of a contract assented to by clicks on a computer screen, or other such instruments presented by providers or clients having no reasonable expectation that the terms in such instruments would be read, understood, and assented to by the party to whom they were or will be presented if that party were well advised of their significance, and which had, have, or would have the purported effect of abrogating procedural rights necessary or useful to a party seeking at some future time to enforce a contract or to recover compensation for harm caused by a breach of warranty by a provider of goods or services.

Standard Warranty of Fair Value. Accordingly, it is hereby agreed between Jane Doe and any person purchasing good or services from her or any person or firm who is providing, has provided, or will provide her with goods or services that no warranty other than a warranty of general merchantability has been or will be made by the provider unless such warranty is expressed in writing and signed by that provider, but that (1) the provider is fully responsible for all direct or indirect consequences if the goods or services provided are not fair average quality; (2) if it is determined that there has been a breach of the warranty of merchantability, the provider will reimburse the full costs of the client's or the consumer's legal expenses including attorneys' fees (and fees for services necessary to collect fees) and reasonable compensation for the wasted time of the client or consumer; and (3) the provider will pay punitive damages in a deterrent amount if the harmful defect is shown to be the result of willful neglect or malice on the part of the provider or its officers or employees, and malice will be presumed if the provider unreasonably delays to cure a breach.

Prompt and Inexpensive Due Process of Law. It is further agreed that any claim by any party arising out of any contract to which Jane Doe is a party will be amiably settled if possible. A provider failing promptly to make a fair offer to settle a complaint by the client or consumer agrees to pay additional punitive damages sufficient to deter such neglect or malice in future transactions. If a dispute is not amiably settled, it will be resolved by litigation in a court of the state of North Carolina sitting in Durham County. Any client of or purchaser from, or provider of goods or services to, Jane Doe hereby appoints John Doe, 1616 Pinecrest Road, Durham North Carolina 27705, as his, her, or its agent for the receipt of service of process in any action brought by Jane Doe arising out of a contract with her, and Jane Doe hereby agrees that she is equally subject to service of process at the very same address. In any action arising out of a contract with her, each party agrees to make, at his, her, or its own expense, full and prompt disclosure to the other of any possible evidence that might assist an adversary in proving a claim or defense including evidence bearing on the state of mind of any alleged malefactor and to forego any further presentation of a claim or defense upon failure to make such disclosure. It is further agreed that, unless both parties waive the right to trial by jury after a claim has been made, the dispute will be resolved by a jury of twelve persons selected in accordance with North Carolina law. In the interest of economy and dispatch, there shall be no examination of prospective jurors or any peremptory challenges to the participation as a juror of any resident of Durham County. In the interest of economy, it is further agreed that the jury's verdict shall be (like an arbitral award) the final disposition of the dispute and shall not be reviewed by any court. Also to avoid cost and delay, neither party will seek or accept summary judgment or any other form of pretrial disposition, or the direction of a verdict by a judge. It is further agreed that both parties retain their rights to aggregate any claim arising between them with other like claims and to participate in a class action against the other party and that such an aggregation of claims or class action shall be tried by jury in the same forum and on the same efficient terms as are here specified. Finally, to prevent needless cost and delay, it is agreed that any attorney representing a party in an action arising out of a contract made by Jane Doe who seeks in court to challenge the validity of any of these Equal Protection or Due Process terms on any ground not provided herein shall be forthwith dismissed from the representation and shall not be replaced.

Freedom to Decline Equal Protection and Due Process. While these terms have been drafted to assure Equal Protection and Due Process of Law to all parties to all contracts with Jane Doe, she fully respects the persons with whom she does business and would never impose these or any other terms on any person or firm who timely informs her that such terms may be disadvantageous to themselves. Any provider or client receiving this instrument is invited by certified mail to express concern that they may not be equally protected by these terms or may not receive the process that is due, and to decline these terms at any time within thirty days after the date on which this document is published at her website or is otherwise brought to the attention of a provider or client. Failure to decline them in a timely manner will, however, be an acknowledgment by that provider or client that these terms are equally beneficial to both parties to their past, present or future agreement with Jane Doe and are assented to as provisions of those contracts. Any provider or client who declines these rights thereby waives the right to insist upon any terms previously or in the future recorded in a printed ticket, circular, package insert, health care form, bill enclosure, electronic notation, or similar instrument that he, she, or it may have dispatched to or received, or may in the future dispatch to or receive from, Jane Doe, so that both parties will then be in the legal position they would have been in if no fine print terms giving procedural advantage to one party over the other had even been or ever will be written by either to be imposed on the other.